HJ HUSIN HJ IDRIS

v.

ISMAIL HASHIM

HIGH COURT MALAYA, ALOR SETAR
ALAUDDIN MOHD SHERIFF J
[CIVIL SUIT NO: 22-200-1989]
9 NOVEMBER 2000

CONTRACT: *Formation - Concluded contract - Written agreement not produced - Whether oral evidence could be adduced*

EVIDENCE: *Presumption - Adverse inference - Written agreement not produced - Whether act was deliberate - Whether presumption of adverse inference could be invoked - Evidence Act 1950, s. 114(g)*

LAND LAW: *Sale of land - Unregistered transfer - Full payment of purchase price - Purchaser had taken possession - Whether purchaser equitable owner*

The dispute between the plaintiff and defendant was in relation to a piece of land. According to the plaintiff, he had purchased the land from one Ariffin in 1949. However the said agreement was lost whilst in custody of the plaintiff's solicitors. The plaintiff's evidence was that the full purchase price was paid and that he took possession of the land and worked it until 1951 after which he handed it over to his brother-in-law ('Haji Murat') who continued to work it until 1988.

In October 1988, the defendant who claimed to be the rightful beneficiary of Ariffin took possession of the land from Haji Murat. The defendant then worked the land and remained in possession until 1996. The defendant also denied the existence of the said agreement. The issue for consideration was whether the plaintiff had, on a balance of probabilities, proved the existence of the said agreement.

Held:

[1] The failure of the plaintiff to produce the written agreement for the sale of the land was not a deliberate act on his part to hide the evidence. No adverse inference therefore should be drawn against the plaintiff.

[2] Although the said agreement was the best evidence, oral evidence could also be adduced to establish that there was an agreement between the plaintiff and the defendant.

[3] Based on the fact (a) that the plaintiff had produced a witness who said that he had actually witnessed the agreement; and (b) that the plaintiff had been in occupation until 1951 when he handed possession of the land to his brother-in-law, the plaintiff had therefore, on a balance of probabilities, established that he had purchased the land from Ariffin in 1949.

[4] Since the plaintiff had paid the full purchase price of the land and had been given possession and had enjoyed continuous occupation of the same, the principle of equity applied in his favour and he was therefore the equitable owner of the land.

[Plaintiff's claim allowed.]

Case(s) referred to:
Kersah La'usin v. Sikin Menan [1966] 2 MLJ 20 ***(refd)***
Lysaght v. Edwards [1876] 2 Ch D 499 ***(refd)***
Munah v. Fatimah [1968] 1 MLJ 54 ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

For the plaintiff - En Victor; M/s Abdul Halim Said & Co
For the defendant - En Bahadur; M/s Abu Zahar Syed Mohd Fuad & Partners

Reported by Mariette Peters-Goh

JUDGMENT

Alauddin Mohd Sheriff J:

By way of an amended statement of claim dated 3 June 1997 the plaintiff prays for the following orders:

(a) an injunction restraining the defendant whether by himself or by his servants or agents or otherwise whosoever from trespassing, entering, cultivating, receiving subsidy from the Government or obstructing or interfering with the plaintiff's right, use and enjoyment of the said land;

(b) an order directing the defendant to forthwith vacate and deliver vacant possession of the said land to plaintiff;

(c) loss of rental of RM1,750 per season from January 1989 until delivery of vacant possession of the said land to the plaintiff;

(d) damages for trespass;

(e) costs.

The plaintiff in this case is one Haji Husin bin Haji Idris, who died on 24 November 1996, long before the commencement of the trial of his action. Thereafter his daughter, Hasnah bin Husin was appointed his legal representative for the purpose of pursuing this action. In this action it is not disputed that the registered owner of the said land ie, land comprised in S.P. No. 38573 known as Lot 180, Mukim Putat, Daerah Telaga Chang, Kubang Pasu, Kedah, is one Chik bin Mohd. Said, as stated in the document of title (P1) which was produced before this court.

According to PW1 her father, the plaintiff, had bought the said land from one Ariffin bin Chik for the sum of RM1,800. A written agreement in respect of the sale of the said land was executed by the parties on 20 March 1949. It was witnessed by Haji Murat bin Mat, the plaintiff's brother-in-law, and Bidi bin Haji Idris.

In the words of PW1 the said agreement was surrendered to Messrs. Conagham, Wherfort & Thornton, a firm of solicitors, who was then acting for the plaintiff in a petition for the administration of the estate of Chik bin Mohd. Said. It was whilst in their custody that the said agreement was lost. Hence, the said agreement was not produced before this court during the trial.

It is the evidence of PW1 that the full purchase price of RM1,800 was paid by the plaintiff to Ariffin bin Chik. The plaintiff then took possession and tilled the said land until 1951 after which he handed over the said land to his brother-in-law, Haji Murat bin Mat who continued to work the said land right up to 1988. Whilst in their possession for the past 39 years or so, the said land was free from any interference from any party.

Suddenly in October 1988, the defendant (Ismail bin Hashim) who claims to be the rightful beneficiary of Chik took possession of the said land from the said Haji Murat bin Mat. The defendant worked and remained in possession of the said land until September 1996. Earlier, on 27 November 1989 the plaintiff had also applied for an order for injunction for the same purpose. However, as there was an attempt by both parties to settle the matter, the application was not heard until 20 July 1996 when the plaintiff obtained the order for injunction.

Further, according to PW1, her father, the plaintiff, had tried to transfer the said land to her by filing the petition for the administration of the estate of Lebai Chik bin Mohd. Said. However, the said petition was not pursued by the plaintiff as the defendant's father (Hashim bin Shariff) had earlier (in 1954) filed the same petition.

In his defence the defendant had vehemently denied the existence of the sale agreement of the said land but instead alleged that it was the duty of the plaintiff to prove that such agreement existed. Since the agreement was not produced in court the plaintiff had failed in their duty. The plaintiff's explanation that the agreement was lost whilst in the custody of his counsel is too lame an excuse to be accepted, according to the defendant. The defendant also dismissed as weak excuse the plaintiff's attempt to prove the existence of the agreement by way of filing the petition for administration as in P6.

In his evidence the defendant reiterated that Chik bin Mohd. Said as mentioned in P1 did not have a son by the name of Ariffin. The defendant claims that he by virtue of being the grandson of Chik bin Mohd. Said is the rightful beneficiary and is therefore entitled to the said land.

The defendant also alleged that the evidence of PW2, Bidi bin Haji Idris, who together with Haji Murat bin Mat were witnesses to the agreement, is untrue. It follows therefore that his evidence has not in any way helped to prove the existence of the agreement as alleged by the plaintiff. That being the case the plaintiff has failed to prove his case on a balance of probabilities and his action should therefore be dismissed.

In the circumstances of this case, this court is now faced with a responsibility to determine on a balance of probabilities whether the plaintiff had successfully proven the existence of the agreement, as alleged.

The question that I have to ask myself is this. In the absence of the agreement alone, will I be justified in holding that the plaintiff has failed to prove his case on a balance of probabilities and therefore the claim should be dismissed? I do not think so. For I am not estopped from considering the evidence given by the plaintiff's witnesses *viva voce* before this court in addition to other documents produced by the plaintiff. It is the duty of this court to carefully consider these evidence before making any decision as to whether the plaintiff has proven his case on a balance of probabilities.

It must be noted that when the defendant entered onto the said land the plaintiff immediately took up this action in order to recover his land. At the same time he filed an application to obtain an order for injunction. Further, in order to protect his interest, the plaintiff registered a caveat on the said land on 14 January 1989. Then later on 5 April 1995 PW1 again entered a caveat on the said land.

I must say with the greatest of respect to the defendant that the failure of the plaintiff or PW1 to produce the written agreement for the sale of the said land is not a deliberate act on their part to hide evidence. I am sure that the agreement being the best evidence to prove the plaintiff's case would be produced before this court if it were available. Unfortunately the agreement went missing whilst in the custody of their counsel. This fact had been satisfactorily explained by PW1 in her evidence. To my mind, the petition no. 40/1955 (P6) filed by the then plaintiff's counsel on 29 January 1955 supports the view that the plaintiff in fact engaged counsel to apply for the administration of the estate of Chik bin Mohd. Said for the purpose of effecting transfer of the said land to the plaintiff as purchaser based on the said agreement. It would not be wrong to suggest that in order to prove that he had a right to file the petition the plaintiff would have to produce the agreement which was in his possession then. It would also not be wrong to assume that the said agreement would have to be surrendered to his counsel for the purpose of the petition. Unfortunately, the said petition could not be proceeded with as there was an earlier petition filed by defendant's father. To make matters worse the said agreement was lost. Such was the evidence of PW1 before this court. Having heard her evidence and witnessed her demeanour I have no qualms in saying that PW1 was telling the truth. I see no reason for her to lie about the whole matter. Under these circumstances I hold that no adverse inference under s. 114(g) of the Evidence Act 1950 could successfully be raised against the plaintiff or PW1 for failure to produce the agreement.

Further, even if the plaintiff had failed to produce the agreement there was the evidence of PW2, Bidi bin Haji Idris, to support the existence of the said agreement. In his evidence PW2 had stated that he was one of the witnesses to the agreement. The other witness was Haji Murat bin Mat who had died on 19 April 1997 before the hearing of this action. Again, I must say that I have no reason to doubt the evidence of PW2. I find that he is a truthful witness. PW2 had in fact seen the handing over of the purchase money from the plaintiff to Ariffin. PW2's evidence was never challenged by the defendant in cross-examination.

The other important factor which I have to consider is the fact that since the purchase of the said land, the plaintiff had been in occupation until 1951 when he handed over the land to his brother-in-law, Haji Murat. To my mind, it is inconceivable how the plaintiff could have occupied and worked the said land for so long without paying any rentals to anyone and without interference from anybody, if he had not bought the said land. If it were true that the defendant's father was the rightful beneficiary of Chik

bin Mohd. Said, I am rather surprised that they raised no objection to the plaintiff's occupation of the said land earlier. It was only five years after the plaintiff had occupied the said land did the defendant's father file a petition for the administration of the estate of Chik.

Adverting now to the evidence of the defendant, I must say, again with respect, that it is most doubtful and unbelievable. In his evidence, the defendant had said that by virtue of being the 'great grand nephew' of Chik bin Said he was the rightful beneficiary. However, at para. 7 of his pleading and in his affidavit dated 22 January 1990 (encl. 4) he had stated that he was the 'grandson' of Chik. In his cross-examination he assertively said that he was the 'grand nephew'. The defendant's father, Hashim bin Shariff in his application for administration of the estate of Chik ie, petition no. 277 tahun 1954 (P7) had also described himself as 'grand nephew' of Chik. No explanation was offered by the defendant regarding this conflicting evidence.

It was also the defendant's contention that a 'Sijil Faraid' was issued in respect of the estate of Chik. But the defendant had failed to produce the same before this court. The 'Sijil Faraid', if produced, would be the best evidence to prove whether the defendant or his father is in fact the rightful beneficiary of Chik. No reasons were advanced as to the failure of the defendant to produce the 'Sijil Faraid'. I would surmise that if produced it would be unfavourable to the defendant. In the circumstance, I hold that 'adverse inference' under s. 114(g) Evidence Act 1950 would apply against the defendant.

There is one other aspect of the defendant's evidence, which I find rather doubtful. It is the production of D13 by the defendant. According to the defendant D13 is the original grant or document of title and not P1. Having perused the document I find that D13 is not the original document of title. My reasons are as follows:

(a) P1 is dated **16 Zulhijah 1346 Hijrah** whilst D13 is dated **18 Rejab 1373 Hijrah.** (emphasis is mine)

It must be emphasised that attached to P1 is a plan showing the size and location of the said land and it is issued 28 years earlier than D13. As such it is very unlikely that D13 could be the original document of title.

(b) P1 is a complete and comprehensive document of title according to the Kedah Land Enactment (No. 56) and the National Land Code 1965, whilst D13 is merely a confirmation by the PTD Kubang Pasu dated 20 April 1954 that the said land was registered in the name of Chik bin Mohd. Said with an area of 7 relong 312 jemba 60 k.p.

(c) Before the coming into force of the National Land Code on 1 January 1966, the Kedah Land Enactment (No. 56) was applicable. Under this enactment, 'document of title' is defined as follows:

> 'document of title' means a Surat Putus Besar, Surat Putus Kechil, Lease of State land or other document evidencing title registered under the law in force for the time being for the registration of titles, document of title and for the purpose of Chapter IV shall be deemed to indude any Surat Akuan, permit or banchi sewa entry.

D13 is not a 'Surat Putus Kechil' (schedule IV) or a 'Surat Putus Besar' (Schedule III) and neither is it a 'Surat Akuan' or 'permit' or 'banchi sewa entry'. D13 is therefore not the original document of title.

Having considered all the evidence available before me, I am of the opinion that the plaintiff had on a balance of probabilities, established that he had purchased the said land from Chik and since then he had been occupying the said land. In 1951, he handed over the said land to Haji Murat who worked the said land until the end of 1988 when the defendant illegally entered the said land. The said land was subsequently recovered by the plaintiff when his application for an injunction was allowed.

Consequently, as the plaintiff had paid the full purchase price of the said land and given possession of the same and had enjoyed continuous occupation without any interference, I would hold that the principle of equity would apply in his favour. He is therefore an equitable owner of the said land.

This principle of equity had been clearly stated in the case of *Munah v. Fatimah* [1968] 1 MLJ 54. There Raja Azlan Shah J (HRH as he then was) had this to say:

> The legal position is that there is an ordinary contract for the sale of land which is not subject to the consideration inherent in commercial contracts. Relying on the contract the Plaintiff went into occupation and did such acts as were necessary and relevant to show that she was in possession. She never got off the land. As from that time, it seems to me, that she was the equitable owner of the said land. What is required now is to clothe the equitable estate with a legal title. She therefore seeks the aid of this court. In my opinion she is well entitled to the relief she claims. The law with regard to an agreement to sell land under an expectancy of title is discussed in my judgment in *Kersah La'usin v. Sikin Menan*[1] and I do not think I can profitably add to what I have there said.

The defendant in this case is absolutely not entitled to be on the said land. Even assuming for a moment that the defendant is the rightful beneficiary of Chik, under the agreement he would hold the said land as 'bare trustee' (See (i) *Lysaght v. Edwards* [1876] 2 Ch D 499 and (ii) *Kersah La'usin v. Sikin Menan* [1966] 2 MLJ 20).

Based on the above reasons, I would allow the plaintiff's claim at prayers (a)(b)(c)(d) and (e). On the authorities cited above and in the exercise of the powers vested in me I would direct that the said land be transferred to the plaintiff. The Pentadbir Tanah Daerah Kubang Pasu is hereby directed to do the needful to effect such transfer. As prayers (c) and (d) are related I would direct that they be consolidated and assessed together by the senior assistant registrar.